



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 19, 1992

Ms. Nan P. Seidenfeld  
Attorney at Law  
Foster, Lewis, Langley, Gardner  
& Banack  
1100 NBC Bank Plaza  
112 East Pecan Street  
San Antonio, Texas 78205-1533

OR92-67

Dear Ms. Seidenfeld:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14338.

The Northside Independent School District ("school district"), which you represent, has received a request from an attorney of an employee for a copy of the transcribed statement relating to an investigation of an alleged extramarital liaison between the employee and her supervisor. In addition, the requestor seeks any other statements that she or her husband made, whether transcribed or recorded, including notes of any conversations with the superintendent or any other person connected with the school district. The requestor also requests any statements that relate to her made by the supervisor. Finally, the requestor seeks any statements relating to her that have been given by an office manager or any other of her co-workers. You have submitted to us for review three sworn statements relating to the alleged incident that were taken by attorneys for the school district and the school district's director of auxiliary personnel, and transcribed by a court reporter. You claim that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(2), and 3(a)(3) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You first claim that the requested information is excepted from required public disclosure by the informer's privilege, as incorporated into the Open Records Act by section 3(a)(1). Open Records Decision No. 549 (1990). The informer's privilege applies when a person reports violations of the law to officials having a duty to enforce the law. Open Records Decision No. 515 (1988). The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* If the contents of the informer's statement would tend to reveal the identity of the informer, the privilege protects the statement itself to the extent necessary to preserve the informer's anonymity. *Id.* Moreover, the basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.*

We have examined the transcripts submitted to us for review. The witness statements were taken from school district employees who responded to questions by the school district's director of auxiliary personnel and school district attorneys about matters relating to school district business. You assert that some of the conduct reported and described in the witness statements could, if true, be construed as illegal. However, it is apparent from the transcripts that the witnesses did not consider themselves to be reporting illegal behavior. Accordingly, the requested records do not fall within the informer's privilege. *See* Open Records Decision No. 579 (1990) at 8 (copy enclosed).

Section 3(a)(1) also excepts from required public disclosure information deemed confidential under the doctrine of constitutional privacy. We note that the requested materials include medical information about a witness, including information about medications that have been prescribed to him. Such information is excepted from required public disclosure under the doctrine of constitutional privacy. Open Records Decision No. 455 (1987) at 8-9. For your convenience, we have marked the information that must be withheld from required public disclosure under the constitutional privacy aspect of section 3(a)(1).<sup>1</sup>

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<sup>1</sup>Some of the requested materials include medical information about the employee. Because the records have been requested on her behalf, we have not marked this information. V.T.C.S. art. 6252-17a, § 3B.

You also claim that the requested information is excepted from required public disclosure by section 3(a)(2). Section 3(a)(2) excepts from required public disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This section protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act by the Texas Supreme Court in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. In Open Records Decision No. 579, this office held that information relating to a complaint of sexual harassment was not the sort of profoundly personal information that implicates common-law privacy interests. Open Records Decision No. 579 (1990). In addition, this office has expressly recognized that such information relates to an area of public interest, *i.e.*, the working environment and on-the-job conduct of public employees, and is therefore of legitimate public concern. *Id.*; *see also* Open Records Decision No. 438 (1986). Thus, the majority of the statements are not excepted from disclosure. The requested materials, however, include information about a witness that relates to aspects of his marriage and family life, which are highly intimate and are not of legitimate public concern, and is therefore confidential under the doctrine of common-law privacy under section 3(a)(2). For your convenience, we have marked the information that must be withheld from required public disclosure under section 3(a)(2).<sup>2</sup> The remainder of the information, although potentially embarrassing to some persons, may not be withheld under section 3(a)(2).

You claim that the requested information is excepted from required public disclosure by section 3(a)(3), the litigation exception. Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various

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<sup>2</sup>We note that there are some references to the employee's marriage and family life. Because the records have been requested on her behalf, we have not marked this information. V.T.C.S. art. 6252-17a, § 3B.

political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies to information relevant to litigation that is pending or reasonably anticipated. Open Records Decision No. 551 (1990). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. Section 3(a)(3) requires concrete evidence that a claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989) at 5.

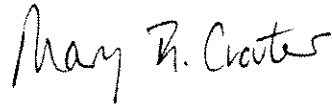
You assert that litigation can be reasonably anticipated because the employee has retained an attorney. This is not sufficient evidence for this office to conclude that litigation is reasonably anticipated. See Open Records Decision Nos. 557 (1990) (mere contemplation of future litigation not sufficient to invoke section 3(a)(3)); 361 (1983) at 2 (fact that request made by attorney on behalf of rejected applicant not sufficient to invoke litigation exception). Having considered your arguments and having examined the documents submitted to us for review, we conclude that there is not sufficient cause to believe that litigation may be reasonably anticipated. Accordingly, you may not withhold the requested information from required public disclosure under section 3(a)(3) of the Open Records Act.

Finally, you claim that the requested information is excepted from required public disclosure by the "work-product" privilege under Rule 166(b)(3) of the Texas Rules of Civil Procedure. An attorney's work product is not protected as information deemed confidential by law under section 3(a)(1). Open Records Decision No. 574 (1990) at 6, 8 (copy enclosed). Such information may be excepted from disclosure under section 3(a)(3) only if the requirements of that section are met. *Id.* Because you have not met the requirements for nondisclosure under section 3(a)(3), you may not withhold the requested information under the "work-product" privilege. With the exceptions noted above, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with

a published open records decision. If you have questions about this ruling, please refer to OR92-67.

Yours very truly,

A handwritten signature in cursive script, reading "Mary R. Crouter".

Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MRC/GK/lcd

Ref.: ID# 14338  
ID# 14553

Enclosures: Open Records Decision Nos. 579, 574  
Marked Documents

cc: Mr. Edward L. Pina  
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(w/o enclosures)